3

Industrial Headwinds: Reducing the Burden of Regulations on US Manufacturers

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An out-of-control regulatory state is the greatest threat to US manufacturing. The situation is a consequence of a broader breakdown in the separation of constitutional powers, mostly reflected in an ineffective legislature willingly surrendering its authority to an overeager executive branch.

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Club for Growth Foundation is a 501(c)(3) non-profit organization focused on educating the public about the value of free markets, pro-growth policies, and economic prosperity.

INTRODUCTION

Washington has saddled manufacturers with restrictions, rules, and regulations ostensibly to mitigate this social ill or facilitate that social goal. Environmental regulations, occupational safety rules, the workers' compensation system, mandated employee health coverage, import compliance, export compliance, and many other federal mandates have been thrust upon US manufacturers over the decades.

In more recent years, concerns about national security, the battle for technological supremacy, the reliability of trade partners, precarious global supply chains, and social dissonance caused by the supposed "hollowing out" of manufacturing have opened the door to a new set of paternalistic proposals to rescue, revitalize, or repurpose the manufacturing sector.

For decades, policymakers have poked and prodded, bound and gagged, and dug their sharp regulatory spurs deep into the sides of America's manufacturing corpus. In 2022, the costs of federal regulations accounted for 12% of US GDP, or 20% more than the value produced by the entire US manufacturing economy. Remarkably, despite this abuse, US manufacturing still measures up well against its own past performance and against the contemporary performance of other countries' industrial sectors. But that is changing. The intensifying global pursuit of resources, especially critical minerals needed to produce semiconductors, electric vehicle batteries, and other technology goods, is stoking competition among countries to attract investment in production capacity and research and development (R&D). Whether a country's regulatory environment helps or hinders those efforts will be a significant determinant of future investment location decisions.

The Biden administration—abetted by the last Congress—has chosen to offer massive subsidies to induce manufacturers to make semiconductors and green products in the United States. Even if that approach to the challenge were wise in theory, the rules around those industrial policies operate at cross-purposes, adding unnecessary complexity, uncertainty, and costs to the existing US regulatory morass.

US manufacturing is especially burdened by a wayward regulatory state that is politicized, opaque, disconnected from sound economic underpinnings, and, all the while, mocking the separation of powers established under the US Constitution. Major legal and structural reform, requiring action from all three branches of the federal government, is needed to mitigate the damage and correct our course.

Yes, Manufacturing Matters

With a global technology revolution in full swing and competition among many of the world's economies heating up, manufacturing innovation and production driven by R&D are essential to US economic and security objectives. Manufacturing matters because it is better than most sectors at attracting capital for R&D, commercializing innovation, and producing to scale. This helps keep the United States at the technological fore. US manufacturers succeed when they can direct resources toward innovation and productivity rather than toward lobbying and influence peddling.

Unfortunately, politicians evoke the strategic importance of manufacturing to push policy interventions that not only fail to strengthen the manufacturing sector but even actively hurt it. Tariffs that raise the cost of production, export restrictions that reduce economies of scale, and subsidies that encourage the use of more expensive or less efficient industrial inputs and processes do nothing to confront the most pressing challenge facing the manufacturing industry: overregulation.

Manufacturing matters. But interventionist prescriptions will only increase the regulatory burdens at a time when reducing accumulated restrictions and limiting new ones are the best ways to strengthen what is still the world's most competitive manufacturing sector.

The Large and Growing Costs of the Regulatory State

Regulations issued by the US government cost the economy an estimated $3.1 trillion in 2022—close to 12% of US GDP.[1] To put that in perspective, the total value added of the US manufacturing sector in 2022 was $2.6 trillion, which is to say the US regulatory state is 20% larger than the entire US manufacturing economy.[2]

The problem is growing. For manufacturing firms, the cost of federal regulations in 2022 was roughly $350 billion, or 13.5% of the sector's GDP—a burden 26% greater than the inflation-adjusted cost of regulatory compliance in 2012.[3] Whereas the average US company pays approximately $13,000 per employee annually to comply with federal regulations, the average US manufacturer pays more than $29,100 per employee—more than double.[4] This cost increases to a staggering $50,100 for manufacturers with fewer than 50 employees.[5] The unconscionable burden on smaller manufacturing firms restricts competition and, therefore, the innovation, dynamism, and productivity it spurs.

The dollar value of compliance costs is one objective measure of the financial burden of regulations. Other metrics can further enhance our understanding of the breadth of the problem confronting manufacturers (and the rest of the private sector). The Competitive Enterprise Institute (CEI) publishes an annual report

1 Nicole V. Crain and W. Mark Crain, *The Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business*, National Association of Manufacturers (October 2023); figure expressed in 2023 dollars. https://nam.org/wp-content/uploads/2023/11/NAM-3731-Crains-Study-R3-V2-FIN.pdf.
2 US Bureau of Economic Analysis, "Gross Domestic Product: Manufacturing (31–33) in the United States," Federal Reserve Economic Data, Federal Reserve Bank of St. Louis, March 1, 2024, https://fred.stlouisfed.org/series/USMANNQGSP.
3 Crain and Crain, *The Cost of Federal Regulation*.
4 Crain and Crain, *The Cost of Federal Regulation*.
5 Crain and Crain, *The Cost of Federal Regulation*.

FIGURE 1.

***Federal Register* Pages per Decade**

Source: Competitive Enterprise Institute, *Ten Thousand Commandments 2023, Figure 11*

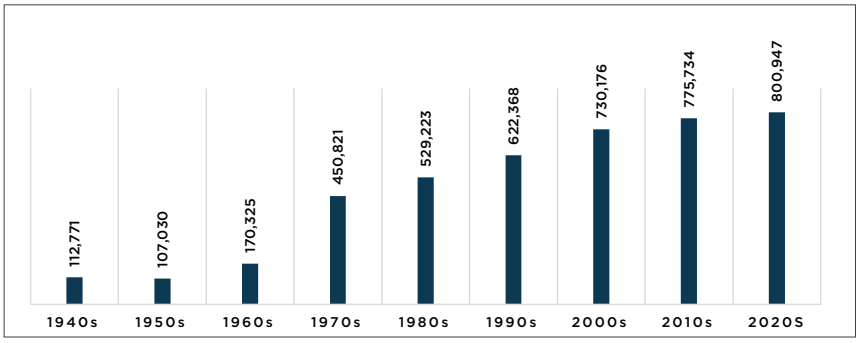
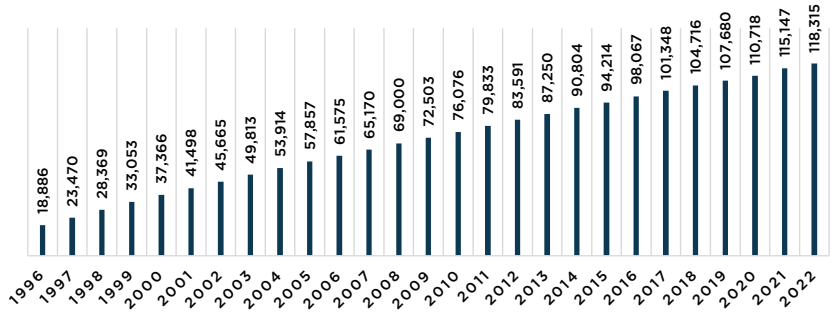


FIGURE 2.

Accumulation of Final Rules Published in the *Federal Register*, 1996–2022

Source: Competitive Enterprise Institute, *Ten Thousand Commandments 2023, Figure 14*



on regulation that includes a variety of measures reflecting the growth of the regulatory state. Metrics, such as the number of published pages in the *Federal Register*, the number of new regulatory rules, the number of new significant rules, and so on, offer a taste of the magnitude of the regulatory state and its growth over time.[6]

Figure 1,[7] published in CEI's latest report, shows the number of pages published in the *Federal Register* over the decades increasing to more than 800,000 thus far in the 2020s alone. Since 1970, the word count in the *Code of Federal Regulations* has more than tripled to more than 100 million. Figure 2,[8] also published in the CEI report, shows the annual accumulation of final rules published in the *Federal Register*. The report notes that "Biden's count of completed economically significant rules is higher than anything seen in the Bush, Obama, and Trump years."[9]

6 Clyde Wayne Crews, "Chapter 5: Page Counts and Numbers of Rules in the *Federal Register*," in *Ten Thousand Commandments 2023: An Annual Snapshot of the Federal Regulatory State*, Competitive Enterprise Institute (November 29, 2023), https://cei.org/publication/chapter-5-10kc-2023/. The first several paragraphs of this chapter describe the various metrics and their value and shortcomings as metrics of regulatory volume.
7 Crews, *Ten Thousand Commandments 2023.*
8 Crews, *Ten Thousand Commandments 2023.*
9 Economically significant rules are those expected to have an economic impact of at least $100 million. These are rules that trigger the requirement that agencies conduct a cost-benefit analysis. Notably, the Biden administration's new guidance to federal agencies redefines "economically significant" as those rules with a likely impact of at least $200 million (https://cei.org/studies/ten-thousand-commandments-2023/#:~:text=Even%20taking%20the%20dip%20into,Trump%2C%2021%20were%20deemed%20deregulatory).

Scholars at George Mason University's Mercatus Center studied the problem of "regulatory accumulation" and put it this way:

> *Depending on how you count, there are somewhere between 80 and 200 federal regulatory agencies. These agencies were created by Congress over the past century and delegated with the authority to make "administrative laws," which most people know as regulations. Federal regulatory agencies represent the center of lawmaking in the United States—every year, far more law comes out of regulatory agencies than Congress.*
>
> *For most of the 20th and 21st centuries, the overall stock of federal regulation has steadily increased. New restrictions frequently compound on top of old ones, narrowing the range of compliant behavior and sometimes becoming redundant or contradictory.*
>
> *Regulatory accumulation—that is, the buildup of regulations over time—remains a pressing policy issue despite broad recognition of the problems it creates. In part, this is because a collection of many accrued rules has a burden that is greater than the mere sum of the individual rules' burden. The sheer volume and complexity of interlocking requirements and exceptions is itself a challenge to decipher. Individuals and businesses face the task of identifying, reading, and understanding regulations before they can even get to the point of complying with the substance of the restrictions. This complexity creates economic barriers to entry, which produce a business environment that favors established large businesses at the expense of startups and other potential new competitors.*[10]

The manufacturing sector bears the brunt of the US regulatory burden, and some manufacturing industries are saddled with more regulations than others. At the broadest levels of industry aggregation, four industries face the most rules: chemicals, paper, transportation, and petroleum/coal.[11]

Interestingly, semiconductor manufacturers—those coveted producers considered so essential to US economic and national security that the Biden administration showers them with taxpayer subsidies to build capacity in the United States—are the latest high-profile victims of regulation. For example, the subsidy terms of the 2022 Creating Helpful Incentives to Produce Semiconductors (CHIPS) Act include non-germane requirements, such as recipients using organized labor and providing ample childcare services to their workers. Semiconductor manufacturers must also comply with a separate and more onerous set of Clean Air Act requirements;[12] these are so burdensome that the delays in the permitting process often render the sought investments unviable from the outset.[13]

As summed up by one journalist, "This industry-specific regulatory framework makes semiconductors more expensive at the same time that we're subsidizing their American manufacture, via the CHIPS Act. Instead of imposing unnecessary costs on key industries, policymakers should strive to make production as cheap as reasonably possible."[14] Similar

10 Mercatus Center, "Regulatory Accumulation," QuantGov, George Mason University, 2022, https://www.quantgov.org/regulatory-accumulation.
11 Patrick McLaughlin, Jonathan Nelson, and Oliver Sherouse, "Regulatory Accumulation in the Manufacturing Sector," Mercatus Center, George Mason University, August 31, 2017, https://www.mercatus.org/research/data-visualizations/regulatory-accumulation-manufacturing-sector. See the various charts reflecting regulations at the 3-digit through 6-digit NAICS aggregations of manufacturing descriptions.
12 Stephen Miran, "How to 'Build America Right,'" City Journal, February 12, 2024, https://www.city-journal.org/article/how-to-build-american-right.
13 Thomas Hochman, "It's Not Just NEPA: Reforming Environmental Permitting," *American Affairs VII*, no. 4 (Winter 2023), https://americanaffairsjournal.org/2023/11/its-not-just-nepa-reforming-environmental-permitting/.
14 Stephen Miran, "How to 'Build American' Right," *City Journal*, February 12, 2024, https://www.city-journal.org/article/how-to-build-american-right.

incongruent policies that simultaneously subsidize and tax manufacturing also beset the production of steel, aluminum, solar panels, wind turbines, and other industries.

Jay Timmons, president and CEO of the National Association of Manufacturers (NAM), reminds us that ". . . two out of three manufacturers [report] that the regulatory burden is preventing them from hiring more workers or increasing pay and benefits" and that "Congress and the administration can help correct this trend by restoring sensible regulations [and] enacting further permitting reforms."[15]

But since Timmons's remarks in late 2023, the state of manufacturing regulation has worsened. The Biden administration recently issued new guidance to its agencies concerning how it should estimate the costs and benefits of regulation going forward. This will have the effect of exaggerating estimated future benefits, rendering regulatory proposals more likely to justify their costs.[16]

Writing approvingly in *The New York Times*, Jim Tankersley described the administration as having "overhauled how the federal government assesses the costs and benefits of regulation," which will have "the effect of justifying more aggressive climate regulations by giving more weight to the benefits of reducing economic damage from global warming in the future."[17]

Susan Dudley, director of George Washington University's Regulatory Studies Center and former administrator of the Office of Information and Regulatory Affairs (OIRA) under George W. Bush, identified other first-order conditions arising from Biden's new guidance. She writes, ". . . instead of requiring agencies to require evidence of a need for regulation based on accepted principles of market failure, the draft would *encourage them to regulate as long as they think they know better than individuals do about individuals' own welfare*"[18] (emphasis added).

If the Biden administration's November 2023 publication of new guidance were not enough to cause deep concern across US manufacturing, the Environmental Protection Agency's (EPA) February 2024 announcement that it will hold manufacturers to even more rigorous "particulate matter" standards most certainly has. The EPA's new standard for emissions of soot, particulate matter often called PM2.5, will fall from 12 to 9 micrograms per cubic meter of air.[19]

A subsequent NAM press release noted that air in the United States is "actually cleaner than ever, due in large part to manufacturers' commitment to innovation," and cited the EPA's recent report that PM2.5 concentrations have declined by 42% since 2000.[20] If enacted, the press release continues, the new standard "would make it far more difficult and costly for manufacturers to operate in the United States" and "would put huge swaths of the country in 'nonattainment,' meaning that they would not meet ambient air quality standards." Translation: factories could be unable to operate, causing economic development to grind to a halt. As noted by the officials at NAM, this rule makes it effectively impossible for American manufacturers to compete. "Europe's current

15 "Overregulation and Workforce Challenges Weigh Heavily on Manufacturing Sector," National Association of Manufacturers, September 13, 2023, https://nam.org/overregulation-and-workforce-challenges-weigh-heavily-on-manufacturing-sector-28360/?stream=series-press-releases.
16 "Biden-Harris Administration Releases Final Guidance to Improve Regulatory Analysis," The White House, November 9, 2023, https://www.whitehouse.gov/omb/briefing-room/2023/11/09/biden-harris-administration-releases-final-guidance-to-improve-regulatory-analysis/.
17 Jim Tankersley, "Biden Finalizes Significant Overhaul in Federal Regulations," *The New York Times*, November 9, 2023, https://www.nytimes.com/2023/11/09/business/biden-regulations-cost-benefit-spending.html.
18 Susan E. Dudley, "Circular Reasoning?" *Notice and Comment* (blog), *Yale Journal on Regulation*, May 25, 2023, https://www.yalejreg.com/nc/circular-reasoning-by-susan-e-dudley/.
19 EPA Press Office, "EPA Finalizes Stronger Standards for Harmful Soot Pollution, Significantly Increasing Health and Clean Air Protections for Families, Workers, and Communities," US Environmental Protection Agency, February 7, 2024, https://www.epa.gov/newsreleases/epa-finalizes-stronger-standards-harmful-soot-pollution-significantly-increasing.
20 NAM News Room, "EPA Releases Punishing New Air Standard," Policy and Legal, National Association of Manufacturers, February 8, 2024, https://nam.org/epa-releases-punishing-new-air-standard-2-30088/?stream=policy-legal

PM standard is 25; China's is 35. If we want the next manufacturing dollar to be spent in America rather than abroad, a standard of 9 is simply not feasible."[21] According to an analysis by Oxford Economics, such a standard "could reduce GDP by nearly $200 billion and cost as many as 1 million jobs through 2031."[22] Not content with the existing assault on manufacturers, the EPA recently announced a radical proposal that would dramatically increase the cost of energy. As noted by Mario Loyola of the Heritage Foundation, "The rule requires all existing coal plants and new natural gas plants that run frequently to eliminate virtually all carbon emissions by using carbon capture technology starting in 2032. The new standards will be virtually impossible for electrical utilities to meet. The Energy Information Administration expects virtually all coal plants—from which Americans get 16% of their electricity—to shut down by 2032 under the rule. And meantime the rule has already frozen investment in the large combined-cycle natural gas plants that are the mainstays of America's power grid." The spike in the cost of energy resulting from this radical proposal will disproportionately harm American manufacturers.[23]

Defiantly, Manufacturing Is Still Performing Well (for Now)

Despite the varied and accumulating impositions thrust upon US manufacturers, the sector continues to perform well overall. In 2022, "real manufacturing GDP" reached a record high of $2.28 billion.[24] Sector value added per worker also reached a record high of nearly $142,000, which was 50% more than South Korea, who landed in second place for that metric.[25]

Still, manufacturing would be appreciably stronger were it not for the myriad of policy headwinds. Regulations and other policies that create uncertainty and raise the costs of production deter investment, effectively seizing equity from the manufacturing economy and often diverting it abroad. Other countries act differently: they are attracting investment to match their abundant raw material and labor resources while simultaneously fostering regulatory environments that promise greater certainty and shorter permitting periods. American manufacturing cannot continue to compete globally under the weight of a metastasizing administrative state.

Mitigating the Burdens of Regulation

Reining in a regulatory state that has grown beyond any reasonable limits is a heavy lift. The checklist is daunting: identifying the problems to address, and in what order; crafting solutions aimed at their root causes instead of their symptoms; and securing buy-in from policymakers across the political and ideological spectra. It is difficult to find grounds for compromise when one major political party mostly prioritizes reducing the burdens of regulation, while the other sees regulation as essential to progress. All three branches of the federal government bear some responsibility for what has become of the regulatory state; all have important roles to play if the effort to fix the problem is to succeed.

Regardless of whether regulation is costly to manufacturing and the broader private sector,

21 NAM News Room, "NAM to House: Overturn Air Standard," Policy and Legal, National Association of Manufacturers, February 16, 2024, https://nam.org/nam-to-house-overturn-air-standard-30185/?stream=policy-legal.
22 NAM News Room, "EPA Releases Punishing New Air Standard."
23 Mario Loyola, "EPA's New Power Plant Rule Will Cause Catastrophic Energy Scarcity," The Heritage Foundation, May 2, 2024, https://www.heritage.org/energy/commentary/epas-new-power-plant-rule-will-cause-catastrophic-energy-scarcity.
24 US Bureau of Economic Analysis, "Real Value Added by Industry: Manufacturing," Federal Reserve Economic Data, Federal Reserve Bank of St. Louis, https://fred.stlouisfed.org/series/RVAMA.
25 Colin Grabow, "The Reality of American 'Deindustrialization,'" CATO Institute, October 24, 2023, https://www.cato.org/publications/reality-american-deindustrialization#united-states-remains-manufacturing-powerhouse.

it has become a favorite tool in the shed of the executive branch, which most administrations are loath to surrender. Dan Lips and Satya Thallam of the Foundation for American Innovation note that "since the 1980s, Republican and Democratic administrations have asserted broad discretion to use their executive authority to shape how the federal government manages and implements regulations, with little pushback from the other side of Pennsylvania Avenue."[26]

Perhaps the core of the problem is the deterioration of the sense of obligation among policymakers to respect the Constitution's separation of powers. In the United States, the legislative branch is supposed to make the laws, and the executive branch is supposed to administer them. However, in many areas of public policy, Congress has ceded its responsibilities to the executive branch, which readily receives them.

The Legislature's Imperative: Take Back Control

Clyde Wayne Crews of CEI views congressional abdication of its power as "one of the main enablers of regulatory growth" because federal agencies are less visible, less interested in compromise, and less concerned about being blamed when regulations backfire.[27] Moreover, passing laws that are written unclearly, fail to convey legislative intent, or lack administrative guidance open the door to broad interpretative variation, risking and often birthing interpretations that are far more burdensome and costly than they need to be.

The nondelegation doctrine holds that it is unconstitutional for the legislative branch to abdicate its responsibilities to the executive branch. Although legislation passed by Congress need not prescribe the specifics of how the executive branch implements the ensuing regulations, the nondelegation doctrine requires there be an "intelligible principle" that connects resulting agency regulations to the authorizing legislation.

Adherence to the nondelegation doctrine has waned; it must be reinvigorated. The right place to start that process is the legislature, in which the purposes and intended effects of its bills should be clear before voting occurs. Limited government requires robust debate surrounding potential law, as well as clearly stated purposes and expected outcomes. The objective should be to foreclose avenues for subjective interpretation and implementation by the executive branch.

In June 2023, the House of Representatives passed legislation that would give Congress the opportunity to reassert its authority when the economic stakes are considered especially high. The Regulations from the Executive in Need of Scrutiny (REINS) Act would allow Congress to vote on major rules—those with an annual price tag of $100 million or more (though recently redefined by the Biden administration as $200 million or more)—before agencies could implement them. In early 2024 this legislation was dead in the Senate, but the idea behind the REINS Act (and similar efforts to strengthen the 1996 Congressional Review Act) to once again legitimize and systematize Congress's oversight responsibilities is consistent with reinvigorating the nondelegation doctrine. Reform efforts such as this should continue.

Today, nearly all official analysis of regulation occurs in the executive branch, mostly at OIRA and the individual agencies. About regulations, Congress has little expertise and few resources—problems that exacerbate the power imbalance that has contributed to the regulatory morass. Establishing something akin to

26 Dan Lips and Satya Thallam, "Congress Needs to Assert Authority over Government Regulations," *The Hill*, December 26, 2023, https://thehill.com/opinion/congress-blog/4377580-congress-needs-to-assert-authority-over-government-regulations/.
27 Crews, "Page Counts and Numbers of Rules in the *Federal Register*."

a Congressional Regulations Office (CRO) to mirror the purpose and operations of the Congressional Budget Office could help restore balance and enable Congress to fulfill its constitutional role.

Kevin Kosar, a scholar of Congress and the administrative state at the American Enterprise Institute, recently published a compelling case for a CRO. He describes the details of what boils down to two core functions of a future CRO: to perform cost-benefit analyses of proposed agency rules and to perform periodic retrospective analyses informed by real data rather than by forward-looking estimates. A CRO would then evolve to fulfill other important roles to help Congress restore equilibrium with the executive branch on regulatory matters.[28] Of course, executive branch concurrence with creating a CRO might be difficult to achieve.

The Executive's Duty: Stop Writing Law and Simplify the Regs

The cost of US regulation is astonishingly high because too much economic activity is subject to it. This is because the guardrails that were designed to prevent burdensome regulation, or to make it more purposed and efficient, have long since been broken. The guardrails are violated because publicly available information on the nature and magnitude of the problems supposedly meriting regulatory solutions is sparse or unavailable. What masquerade as cost-benefit analyses to justify federal agency regulations are usually disconnected from fundamental economic principles and observable reality. These disconnects can be traced to the scarcity of legal obligations to conduct rigorous ex ante or ex post analysis of individual regulations. Ex ante analysis is particularly weak; when performed, results hinge on estimated values for parameters, multipliers, and the dependencies among them. Worse, these variables can be pulled from outdated academic papers that have no real relevance to the immediate analysis.[29]

To rectify this, cost-benefit analyses that comport with widely accepted economic, financial, and accounting principles should be required for all proposed economically significant regulations. Also, the definition and application of "economically significant" should be broadened so that more proposed regulations are subject to this commonsense necessity.

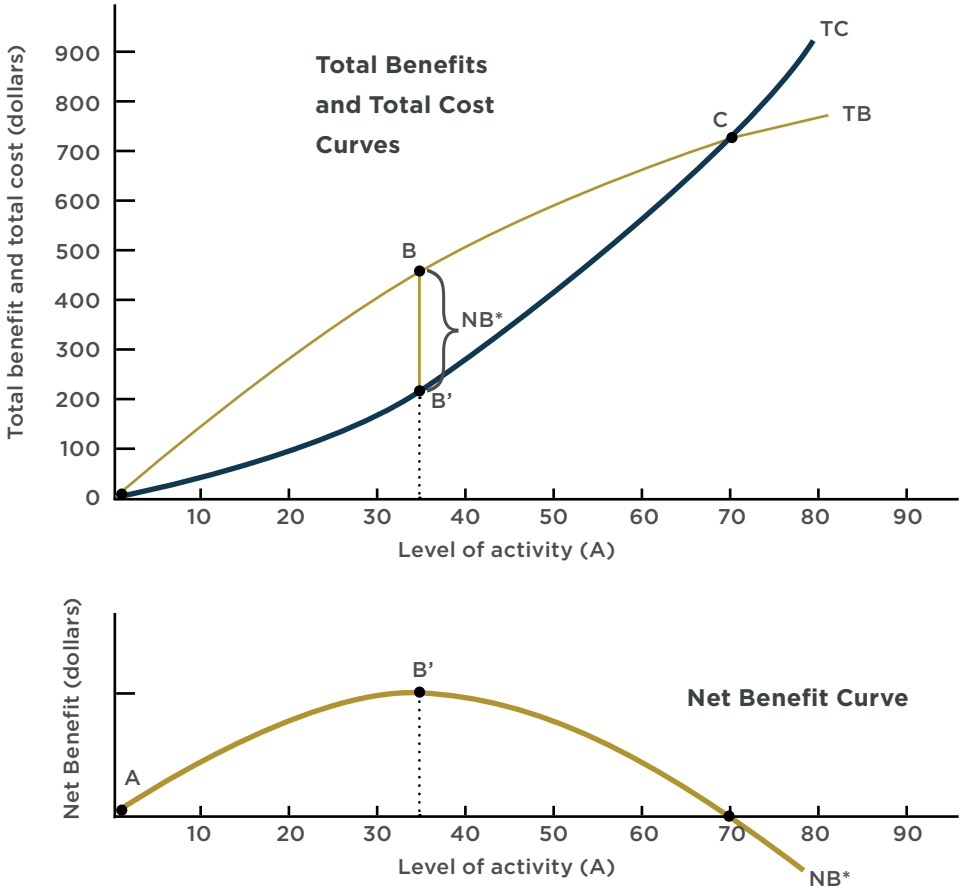
Importantly, agencies should also be required to use "marginal analysis." Marginal analysis is the right way to estimate the amount of regulation, given its increasing costs, that yields the greatest "net benefits."

A fitting example of the utility of marginal analysis is pollution abatement. In 1970, when the EPA began to regulate activities that were presumed to have adverse impacts on environmental quality, the opportunity for air and water quality improvement was vast; there was much low-hanging fruit. Compared to today, the marginal benefit of the first unit of abatement was much greater, and the marginal cost was much lower, because America's air and water quality were poor. But today, after the most obvious and affordable abatement measures have been adopted and the associated benefits reaped, the marginal cost of the next increment of improvement is much greater—and its benefit much smaller. Of course, after working along the continuum of abatement priorities toward the limits of technological feasibility, the marginal costs and benefits of any future increment of abatement continue ever higher, and lower, respectively. This rational and coherent insight must be considered in the analysis of all proposed regulations.

28 Kevin R. Kosar, "The Case for a Congressional Regulation Office," Understanding Congress, January 1, 2024, https://www.understandingcongress.org/2024/01/01/the-case-for-a-congressional-regulation-office/.
29 See Nam D. Pham and Daniel J. Ikenson, *A Critical Review of the Benefits and Costs of EPA Regulations on the U.S. Economy*, NDP Analytics (November 2012), 24–26, https://ndpanalytics.com/wp-content/uploads/ACriticalReviewoftheBenefitsandCostsofEPARegulationsonthe.pdf.

FIGURE 3.

Finding the "Optimal" Level of Regulation



Existing regulatory guidance already mandates that regulating agencies "must, among other things . . . select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits."[30] Net benefits are maximized at the level of regulation where the marginal benefit of an increment of regulation equals its marginal cost. In other words, the "optimal" amount of regulation is the amount that maximizes net benefits, and that happens at the level of regulation where the marginal benefit equals the marginal cost.

Figure 3 helps illustrate these concepts. Net benefits are maximized at 35 units of regulation, where the vertical difference between the total benefits (TB) curve and the total cost (TC) curve is maximized. The net benefit of regulation to society increases with more regulation, up to the point of optimal regulation. (For many regulations, the optimal level may very well be close to zero.) After that, the marginal cost of an additional increment of regulation rises, the marginal benefit declines, and the net benefit to society shrinks.

US regulators tend not to recognize constraints until point C, where total benefits equal total costs. But at every point beyond 35 units and up to 70 units (point C), the net benefit of regulation is declining. And to make matters worse, regulators often overestimate the benefits and underestimate the costs of regulation, putting manufacturers well to the right of point C,

30 "Summary of Executive Order 12866 - Regulatory Planning and Review," Environmental Protection Agency, Accessed March 8, 2024, https://www.epa.gov/laws-regulations/summary-executive-order-12866-regulatory-planning-and-review.

where the net benefit of regulation to society turns negative (TB < TC). This illustrates why NAM has called out the EPA for its latest tightening of particulate matter standards noted previously.

Marginal analysis confirms this instructive conclusion of an Obama-era Council of Economic Advisers report: "A regulation that is expected to eliminate 90 percent of certain harmful emissions at a cost of $100 million per year may well generate higher net benefits than one that eliminates 98 percent of those emissions at a cost of $1 billion per year."[31]

Another approach to address the regulatory problem is available: retrospective analysis. Retrospective analysis can reveal if, how effectively, and how efficiently specific rules have met their objectives. The problem of regulatory spitballing is well-known to policymakers. A former OIRA administrator, Cass Sunstein, said, "The single greatest problem with the current system is that most regulations are subject to a cost-benefit analysis only in advance of their implementation. That is the point when the least is known and any analysis must rest on many unverifiable and potentially controversial assumptions."[32]

A study published by the Office of Management and Budget compared the projected benefits and costs of regulations with the actual benefits and costs measured after implementation. The results "tend to overestimate both benefits and costs, but they have a significantly greater tendency to overestimate benefits than costs."[33]

The idea of regulatory budgeting to cap the annual cost of regulation effectively has a history of bipartisan support. Add to that the discipline of accounting for the costs of regulatory implementation and compliance, and agencies should become more aware of the impacts of their rules. Hopefully, regulators will start thinking more clearly about trade-offs—not only about costs and benefits but about how varied and additional approaches to their analyses can yield more accurate findings.

Moreover, the resources allocated by the agencies to help the private sector navigate the mire of rules to obtain permits and subsequently comply with their associated imperatives are rarely commensurate with the volume and complexity of the relevant regulations. The rules must be simplified and streamlined, but in the meantime, more resources should be made available.

Another area of potential reform that could fall under the rubrics of regulatory budgeting or improving regulatory transparency is the need to make records available, standardized, and digitized for the benefit of the public. Identifying the worst case is easy: no law has spawned more rules than the Clean Air Act. It regulates almost every factory, building, and piece of equipment in a multitude of industries. Thousands of Clean Air Act federal rules commingle with thousands more at the state level.

As an example, to understand where it is most cost-effective to establish a semiconductor plant, it is necessary to compare regulatory costs across states and even counties. But the information needed to make comprehensive and comprehensible evaluations is sparse. There is no uniformity to public recordkeeping and sharing. This renders the regulatory state opaque, inequitable, and oppressive.

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31 Council of Economic Advisers, *Smarter Regulations through Retrospective Review*, Executive Office of the President, (May 10, 2012), 3, https://obamawhitehouse.archives.gov/sites/default/files/lookback_report_rev_final.pdf.
32 Cass R. Sunstein, "Regulation: Looking Backward, Looking Forward," Speech to the American Bar Association, May 10, 2012, https://obamawhitehouse.archives.gov/sites/default/files/omb/inforeg/speeches/regulation-looking-backward-looking-forward-05102012.pdf.
33 Office of Management and Budget, "Validating Regulatory Analysis: 2005 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities," Executive Office of the President, December 16, 2005, 2, https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/assets/OMB/inforeg/2005_cb/final_2005_cb_report.pdf.

Thomas Hochman of the Foundation for American Innovation illumines this problem and describes a potential path to regulatory innovation:

> *[M]any of the solutions to the Clean Air Act's problems will not come in the form of deregulation per se, but rather through regulatory innovation—new frameworks and restructurings of existing rules that will improve efficiency without narrowing the law's substantive environmental protections. That is, done right, Clean Air Act reform will better align environmental and economic imperatives, not suppress one in favor of the other.*[34]

Existing misalignments abound. For instance, the rules sometimes perversely incentivize continued operation of less efficient, higher-polluting equipment over replacing them with better pollution-control technology because the latter requires more rigorous regulatory scrutiny than the former. Clean Air Act experts at the Institute for Policy Integrity note that "pairing restrictive standards for new sources with either lax standards or no standards at all for existing sources creates two problematic incentives: Old plants are encouraged to stay in business longer than they otherwise would, and new plants are discouraged from coming online altogether."[35]

The Judiciary's Responsibility: Stop Deferring and Start Judging

These compounding problems of runaway regulations suggest a more effective role for the judicial branch. Recall Chief Justice Marshall's famous statement in *Marbury v. Madison*: "It is emphatically the province and duty of the judicial department to say what the law is."[36] For too long, the courts have neglected to heed Marshall's words—at least with respect to matters concerning the administrative state. In recent decades, as the tether between regulations and the laws that give them life fray and sever, the judicial branch has been reluctant to offer judgment.

In 1984, the Supreme Court ruled in *Chevron USA, Inc. v. Natural Resources Defense Council* that lower courts should defer to an agency's interpretation of an ambiguous statute if the interpretation is reasonable.[37] What has become known as the "*Chevron* Deference" over the past 40 years is now shorthand for the judiciary's hands-off approach to the administrative state. This broad deference to agency interpretation and decision certainly serves as a primary cause of regulatory overkill.

Lately, however, a series of cases before the Supreme Court concerning matters of administrative interpretation of statutes have been decided without reference to *Chevron*. Many court watchers believe the Supreme Court is reconsidering the *Chevron* criteria and may be about to overturn the long-standing deference in a challenge brought before it regarding the National Marine Fisheries Service (NMFS).[38] At issue is whether the NMFS can require commercial fishing vessels to host environmental observers onboard and require the fishers to pay the observers' salaries.

34 Thomas Hochman, "It's Not Just NEPA: Reforming Environmental Permitting."
35 Richard L. Revesz and Jack Lienke, "The Tragic Flaw of the Clean Air Act," *The Regulatory Review*, May 17, 2016, https://www.theregreview.org/2016/05/17/revesz-lienke-tragic-flaw-clean-air-act/.
36 *Marbury v. Madison,* 5 U.S. 1 Cranch 137. 1803.
37 *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837. 1983.
38 Brief of Petitioners before the Supreme Court of the United States, LOPER BRIGHT ENTERPRISES, et al., Petitioners, v. GINA RAIMONDO, in her official capacity as Secretary of Commerce, et al., Respondents, July 17, 2023, https://www.supremecourt.gov/DocketPDF/22/22-451/272199/20230717152715108_2023-07-17%20Loper%20Bright%20Opening%20Brief%20FINAL.pdf.

Whether *Chevron* is explicitly overturned or superseded with reference to the emerging Major Questions Doctrine (MQD)—which leaves it to the courts, not the agencies, to decide what is reasonable—the case will have far-reaching implications. Whereas *Chevron* requires deference to an agency's reasonable interpretation of an ambiguous statute, the MQD presumes there are issues of major national significance that require agencies' actions to be clearly supported by congressional authorization. As summarized by the Congressional Research Service: "The Supreme Court has rejected agency claims of regulatory authority when (1) the underlying claim of authority concerns an issue of "vast 'economic and political significance,'" and (2) Congress has not clearly empowered the agency with authority over the issue."[39] Reversing *Chevron* likely would open cases that were decided on its grounds to appeal anew, reopening an extensive amount of litigation but also taking deeper hacks at the regulatory state.

Supreme Court Justice Brett Kavanaugh (and at least two other conservative justices) seem to favor overturning *Chevron*. Kavanaugh appears troubled by the way *Chevron* "ushers in shocks to the system every four or eight years when a new administration comes in" and implements massive changes in securities law, communications law, and environmental law, among others.[40]

Whereas *Chevron* deference applies to agency interpretations of statutes, "*Auer* deference," which takes its name from the Supreme Court's 1997 decision in *Auer v. Robbins* but is rooted in earlier Court decisions, generally instructs courts to defer to an agency's interpretation of its own ambiguous regulatory language "unless it is plainly erroneous or inconsistent with the regulation." The Supreme Court recently has recognized circumstances when *Auer* deference was not appropriate, such as when an agency's interpretation is not a result of its "fair and considered judgment," which would seem to open the door to judicial review of potentially very many regulations.[41]

The Supreme Court has made it clear that Auer is not constitutionally required, and Congress may opt to memorialize, abrogate, or modify applications of the doctrine by statute. In fact, Congress could potentially legislate on whether the *Auer* deference or some other standard of judicial review should be applied to regulatory interpretations in particular statutes rather than be applied generally per the authority of the Administrative Procedure Act.[42]

The courts play a vital role in fixing the onerous errors of the regulatory state. Tightening the aperture against interpretations that are at odds with regulatory or statutory language can help to restore a greater sense of predictability to the regulatory environment.

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39 Kate R. Bowers, "The Major Questions Doctrine," Congressional Research Service, In Focus, November 2, 2022, https://crsreports.congress.gov/product/pdf/IF/IF12077.
40 Amy Howe, "Supreme Court Likely to Discard *Chevron*," *SCOTUSblog*, January 17, 2024, https://www.scotusblog.com/2024/01/supreme-court-likely-to-discard-chevron/.
41 Daniel J. Sheffner, *Kisor v. Wilkie: Supreme Court Upholds the Auer Doctrine but Clarifies Its Limitations*, Congressional Research Service (July 3, 2019), https://crsreports.congress.gov/product/pdf/LSB/LSB10322#:~:text=That%20doctrine%2C%20commonly%20called%20the,construction%20of%20ambiguous%20regulatory%20language.
42 Daniel J. Sheffner, *Kisor v. Wilkie: Supreme Court Upholds the Auer Doctrine but Clarifies Its Limitations*.

Conclusion

An out-of-control regulatory state is the greatest threat to US manufacturing. The situation is a consequence of a broader breakdown in the separation of constitutional powers, mostly reflected in an ineffective legislature willingly surrendering its authority to an overeager executive branch.

US regulations and their accumulated residue are inhibiting domestic investment and even chasing it abroad. Investment deterrents can be found in the millions of pages of the *Code of Federal Regulations* and the *Federal Register*. In almost every instance, those deterrents were not intended to discourage US investment. However, without regard to original motivations, capital flows serve as revealing verdicts on the relative strengths and weaknesses of an economy's institutions, policies, and potential. America's capital is flowing offshore.

Fixing or, more realistically, mitigating the problem of regulatory overreach demands changes from all three branches of the federal government.

Congress must act to restore its role to provide oversight of an executive branch that is often zealous to regulate anything that moves. Legislating is more than making and passing laws; it involves pride in ownership of those laws, necessarily entailing oversight of how they are executed and judged by the other branches.

The executive branch must remove sand from the gears by sunsetting outdated regulations; streamlining permitting processes; committing to greater transparency; making more information public, easy to access, and easy to analyze; committing to best practices in the realm of cost-benefit analyses, including the use of marginal analysis; and conducting retrospective assessments of regulations.

Finally, the judiciary is essential to reining in regulatory abuse by informing the other branches what the law is and by generating clear and objective jurisprudence that helps all of them reinvigorate the nondelegation doctrine. Overturning the *Chevron* and *Auer* doctrines of deference would prominently contribute to that reinvigoration effort. Along the way, the judiciary should establish new doctrine to restore and reinforce the separation of powers.

About the Author

Daniel Ikenson is founder and president of Ikenomics Consulting, a firm specializing in data analysis, strategic communications, and issue advocacy on behalf of clients seeking to understand and influence public policy outcomes. For more than 20 years, Ikenson was a scholar at the Cato Institute, where he published scores of papers, articles, books and gave testimony before congressional committees and federal agencies on a variety of trade policy subjects, including US-China trade relations, bilateral and multilateral trade agreements, globalization, US manufacturing issues, foreign direct investment, and trade regulations.

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